Supreme Court, U.S.
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No. 95-2087

In The

Supreme Court of the United States

October Term, 1995

MARY RUTH McCARTHY, GUY COVILLE, EDWARD ORMSBY, CARMEN TOMASETTI and JOSEPH HOFFMAN,

Petitioners,

vs.

RECORDEX SERVICES, INC., COPYRIGHT, INC., SMART CORP., MEDFAX INCORPORATED, HOSPITAL CORRESPONDENCE COPIERS, INC., MERCY HEALTH CORPORATION OF SOUTHEASTERN PENNSYLVANIA, MISERICORDIA HOSPITAL DIVISION METHODIST HOSPITAL, THE GRADUATE HOSPITAL, HAHNEMANN UNIVERSITY HOSPITAL and THE LOWER BUCKS HOSPITAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court issue a writ of certiorari to consider Petitioners' request for creation of a special exception to the direct purchaser rule of *Illinois Brick* and *Utilicorp*, where Petitioners do not directly purchase the product at issue, and where its cost is in fact borne in part or in full by either those who do directly purchase the product or by third parties?

2. Should this Court issue a Writ of Certiorari to determine whether the Court of Appeals and the district court were both wrong in their interpretation of Pennsylvania law on the concept of agency?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

REASONS FOR DENYING THE WRIT 3

I. THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER PETITIONERS' REQUEST FOR CREATION OF A SPECIAL EXCEPTION TO THE DIRECT PURCHASER RULE OF *ILLINOIS BRICK* AND *UTILICORP*.. 3

A. The Decision Below Does Not Conflict With A Decision Of This Court Or Any Court Of Appeals 3

B. The Decision Below Does Not Leave An Important Question Of Federal Law Unaddressed 3

C. The Decision Below Correctly Applies The Policy Rationales Cited By This Court In *Illinois Brick* and *Utilicorp* 4

II. THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER WHETHER UNDER PENNSYLVANIA LAW THE PETITIONERS' ATTORNEYS WERE AGENTS RATHER THAN INDEPENDENT CONTRACTORS FOR THE PURPOSES OF PURCHASING MEDICAL RECORD PHOTOCOPIES 7

TABLE OF CONTENTS – Continued

Page

A. The Decision Below Does Not Create A Federal Common Law Standard For Determining An Agency Relationship And Does Not Involve A Question Of Federal Law In Determining Whether Plaintiffs' Attorneys Are Agents Or Independent Contractors When Purchasing Photocopies 7

B. The Court of Appeals' Resolution Of The Agency Issue Was Correct 9

III. CONCLUSION..... 10

TABLE OF AUTHORITIES

Page

CASES

Bishop v. Wood, 426 U.S. 341 (1976) 8

Butner v. United States, 440 U.S. 48 (1979) 8

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 6

Huddleston v. Dwyer, 322 U.S. 232 (1944) 8

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) *passim*

In Re Toilet Seat Antitrust Litigation, 387 F.Supp. 1342 (E.D. Mich. 1977) 9

Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990) ..... *passim*

Messenger Publishing Co. v. Walkinshaw, 102 Pa. Super. 445 (1931) 8

Pessano v. Eyre, 13 Pa. Super. 157 (1900) 8

STATUTES

15 U.S.C. § 1 et seq. 1

18 U.S.C. § 1961 et seq. 1

RESPONDENTS' BRIEF IN OPPOSITION

All Respondents jointly request that the Court deny the Petition for a Writ of Certiorari seeking review of the Third Circuit's Opinion in this case. The Opinion is reported at 80 F.3d 842 (3d Cir. 1996), and is reproduced in Petitioner's Appendix, Pet. App. at 1a-35a.

COUNTERSTATEMENT OF THE CASE

Petitioners seek review of those portions of a decision by the Third Circuit Court of Appeals denying them standing in their antitrust damages claims (15 U.S.C. § 1 et seq.) and RICO damages claims (18 U.S.C. § 1961 et seq.) against Respondents.[1] The facts surrounding this matter were developed at length in the opinion of the Third Circuit, which Respondents incorporate by reference. *See McCarthy v. Recordex Services, Inc.*, 80 F.3d at 845-46, 853-54, Pet. App. at 5a-8a, 21a.

MISSTATEMENTS OF FACT

Pursuant to Rule 15.2, Respondents wish to correct Petitioners' very significant misstatements of fact. The Petition is premised entirely on the assertion that all photocopy costs incurred by the attorneys who actually

[1] Petitioners do not seek review of the portion of the Third Circuit's opinion which reversed the district court by holding that the direct purchaser rule did not bar Petitioners from standing for the purpose of injunctive relief under Section 16 of the Clayton Act, and remanding for further consideration.

purchased the photocopies were passed through to, and fully reimbursed by, the Petitioners (Petition at 17, 19, 20), and that their attorneys were only "agents" who "temporarily advanced" funds (Petition at 12, 15). The undisputed facts, however, as reflected in the decisions of both the district court and the Court of Appeals, are that none of the direct purchaser-attorneys were entitled to *any* reimbursement from Petitioners unless a settlement or judgment were obtained in the underlying litigation; that the direct purchasers had in fact received reimbursement in the case of only two of the five Petitioners; that even where the direct purchaser-attorneys were reimbursed, the costs of such reimbursement were not necessarily borne in whole or in part by Petitioners, who under no circumstances made any out-of-pocket payments; and that economic variables and likely cost-shifting made the pass-through analysis very complex and uncertain (Pet. App. at 6a-7a, 17a-18a, 21a).

Second, contrary to the Petitioners' assertion (Petition at 6-7), the rates charged by hospitals or copy companies for record copies and associated fees are not uniform (Appellate Record Appendix at 501, 503, 507-08, 510-11, 513-16, 720-22, 737-38, 828-29, 882-84, 1058, 1066).

Third, the Petitioners mischaracterize the testimony when they claim (Pet. at 9) that "the copy service defendants conceded that a patient's hospital records could not be released to an attorney unless the patient signed a written authorization designating the attorney as the patient's authorized representative to obtain those records." The only thing "conceded" by the copy companies, and the only thing evidenced by the record, is that copies of a patient's medical records would not be

sold to anyone, including attorneys for plaintiffs or defendants, without a signed authorization by the patient (Appellate Record Appendix at 564, 566, 567, 569, 571).

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER PETITIONERS' REQUEST FOR CREATION OF A SPECIAL EXCEPTION TO THE DIRECT PURCHASER RULE OF *ILLINOIS BRICK* AND *UTILICORP*

A. The Decision Below Does Not Conflict With A Decision Of This Court Or Any Court Of Appeals

The decision of the Third Circuit explicitly applies, and follows, this Court's decisions in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990). The Petitioners do not even assert a conflict between the Third Circuit's decision and any Supreme Court or other Circuit Court case.

B. The Decision Below Does Not Leave An Important Question Of Federal Law Unaddressed

Citing snippets of dicta (Pet. at 16), Petitioners claim they present a question of law previously unaddressed. They urged the District Court and the Court of Appeals, and urge this Court, to carve out an exception to the direct purchaser rule of *Illinois Brick* and *Utilicorp*, claiming that one hundred percent of the costs are passed on to them and asserting that this situation was left open in *Utilicorp* (Pet. at 16).

Even if the Petitioners could show, contrary to the record, that 100% of the cost of the photocopies would be passed through to them, their argument would still fail in the light of *Utilicorp*. Kansas took the position in *Utilicorp* that all of the cost increases were passed through by the utilities to their customers. Even so, the Court denied standing to anyone other than the direct purchasers based on prior law and policy concerns. *Utilicorp* is squarely on point in this matter, and unequivocally addressed the question presented by the Petitioners.

C. The Decision Below Correctly Applies The Policy Rationales Cited By This Court In *Illinois Brick* and *Utilicorp*

The Third Circuit correctly determined, and applied, the policy rationales underlying *Illinois Brick* and *Utilicorp*. Indeed, those complicating factors are present here in even greater force; apportionment of damages here would be both highly complex and highly speculative. Both the District Court and the Court of Appeals correctly rejected the basic premise of Petitioners' argument, i.e., the contention that 100% of all overcharges are passed through to, and borne entirely by, Petitioners.

First of all, as discussed *supra*, any pass-through at all is contingent on a settlement or other recovery in the underlying litigation; the direct purchasers – the attorneys in the underlying case – thus bear the entire cost in many, if not most, cases. Second, in the face of high photocopy costs, the direct purchaser attorneys may alter their buying behavior and incur *other* never-to-be-passed-through costs. They may, for example, go on site to view

or summarize certain voluminous records personally. Third, as observed by the Court of Appeals, plaintiffs' attorneys may shift part or all of the photocopy costs incurred on behalf of losing plaintiffs, which the attorneys are not reimbursed for, to winning plaintiffs (Pet. App. at 17a-18a). Similar factors were noted by the Court in the paragraph of *Utilicorp* following the dicta cited by the Petitioners (497 U.S. at 218) as an additional reason to deny standing to the indirect purchasers even in the case of 100% cost pass-through.

Fourth, in the cases where the direct purchasers do receive some reimbursement as a result of settlement in the case they were retained to pursue, the amount of that settlement will often reflect, in part, the amount of the plaintiffs' attorneys' out-of-pocket expenses, including payments for photocopies. Even in the case of a verdict, it is the defendants' funds which are then used to cover the plaintiffs' attorneys' expenses – photocopies, airline tickets, deposition transcripts, taxi fare, etc. – before the plaintiff is paid the remainder. Accordingly, it is the settling or losing *defendant* that bears part or all of the photocopy costs.

As the foregoing begins to reveal, if the Court were to carve out an exception to the direct purchaser rule for Petitioners, the actual task of sorting out damages would be extremely complex and daunting. The trial court would have to determine in each case how much, if any, of the overcharge is absorbed by the purchaser-lawyers, how much (if any) rests with the Petitioner-plaintiffs, and how much is ultimately borne by settling or losing defendants. The difficulty in so doing here would be exponentially increased by the myriad of differing retainer

agreements, varying attorney actual practices, and the dissimilar costs of production among the separate hospitals.

Just as in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), *Illinois Brick*, and *Utilicorp*, the complexity of tracing the pass-through here dictates that the direct purchaser rule be applied without an exception. The instant case illustrates well the wisdom of the Court's admonition in *Utilicorp*:

> The rationale underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to "carve out exceptions to the [direct purchaser] rule for particular types of markets." *Illinois Brick*, 431 U.S. at 744. The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. As we have stated:
>
> > "[T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same 'massive evidence and complicated theories' into treble-damages proceedings, albeit at a somewhat higher level of generality."
>
> *Id.* at 744-45.
>
> In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule

> might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions [to the direct purchaser rule].

497 U.S. at 216-17.

II. THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER WHETHER UNDER PENNSYLVANIA LAW THE PETITIONERS' ATTORNEYS WERE AGENTS RATHER THAN INDEPENDENT CONTRACTORS FOR THE PURPOSES OF PURCHASING MEDICAL RECORDS PHOTOCOPIES

A. The Decision Below Does Not Create A Federal Common Law Standard For Determining An Agency Relationship And Does Not Involve A Question Of Federal Law In Determining Whether Plaintiffs' Attorneys Are Agents Or Independent Contractors When Purchasing Photocopies

Petitioners claim that the Third Circuit, in determining Petitioners' attorneys were not Petitioners' agents for purposes of antitrust standing, created federal common law. The only support advanced by Petitioners for this argument is that the Third Circuit noted that none of the cases cited on the agency issue directly discussed the issue in an antitrust standing context (Pet. at 21).

Petitioners' argument misses the mark. The Third Circuit was making no general federal common law pronouncement on agency law. The Third Circuit had simply noticed that the prior Pennsylvania cases dealt with whether an attorney could be personally bound to pay

litigation costs (yes: *Messenger Publishing Co. v. Walkinshaw*, 102 Pa. Super. 445 (1931); *Pessano v. Eyre*, 13 Pa. Super. 157 (1900)). Here, there is no doubt that the attorneys bound themselves to pay, and did pay. The only question is whether the fact that the attorneys bought photocopies in the course of preparing a personal injury lawsuit conferred antitrust standing on their clients.

Petitioners argued below that determination of the issue required examination of *Pennsylvania* law regarding agency versus independent contractorship. The district court and Third Circuit then interpreted Pennsylvania law, albeit contrary to the way Petitioners argued. No "disrupt[ion of] commercial relationships predicated on state law" (Pet. at 21, 22 (citations omitted)) is even articulated by Petitioners, let alone threatened. That the Petitioners disagree with the district court and the Third Circuit in those courts' considered determination and application of state law does not raise a *federal* question of sufficient importance and magnitude as to warrant granting a writ of certiorari. *See Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). The question of whether Petitioners' attorneys were merely Petitioners' agents, or were independent contractors, is a question of local law interpretation in which the Court should defer to the expertise of the Third Circuit. *See Butner v. United States*, 440 U.S. 48, 57-58 (1979) (deferred to Court of Appeals on questions of local law); *Bishop v. Wood*, 426 U.S. 341, 345-46 (1976) (same) (citations omitted).

B. The Court of Appeals' Resolution Of The Agency Issue Was Correct

The courts below properly found Petitioners' attorneys to be independent contractors – not mere purchasing agents – under state law agency principles for the purpose of purchasing photocopies. The Petitioners hired the attorneys on a contingent fee basis, to pursue personal injury or medical malpractice actions, not at a flat fee as purchasing agents. The attorneys purchased the records in their own judgment for their own use, not at the clients' direction or for the clients' use. The attorneys controlled how the job (prosecuting the lawsuit) was performed, retaining exclusive control of the manner of performance. Finally, if the attorneys were to be reimbursed at all for the photocopies, such reimbursement would occur only if the attorneys obtained a recovery in the underlying claim (Pet. App. at 18a-22a). The District Court and the Third Circuit Court of Appeals were quite correct in distinguishing this situation from that presented by a true purchasing agent. Pet. App. at 19a; *see In Re Toilet Seat Antitrust Litigation*, 387 F.Supp. 1342 (E.D. Mich. 1977); *cf. Illinois Brick*, 431 U.S. at 736 n.16.

III. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: July 30, 1996

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